

Decision 02-01-025 January 9, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network (UCAN),

Complainants,

vs.

Pacific Bell (U-1001-C),

Defendant.

Case 99-06-053
(Filed June 29, 1999)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

1. Summary

This decision grants Utility Consumers Action Network (UCAN) \$24,281.57 for its substantial contribution to Decision (D.) 01-10-071. UCAN has properly documented its request for compensation for all hours claimed by its attorneys and for other, miscellaneous costs; UCAN's request is unopposed, and we make no adjustments beyond correction of two, inadvertent mathematical errors.

2. Background

By complaint filed on June 29, 1999, UCAN alleged that Pacific Bell (Pacific) deceptively marketed its "Saver 60" intraLATA toll-calling plan to residential customers during the late spring of 1999 using direct mail and customer service representatives. The marketing effort targeted customers based upon a calling profile. The calling profile was compiled by averaging a

customer's toll charges for three consecutive months (December 1998 through February 1999) and comparing the average to the monthly cost of the plan. Pacific's answer denied any deception but admitted that for some customers, while comparison of the three-month average against the monthly cost of the plan indicated savings would have been realized under the plan, comparison of the same charges for the same period – but on a month-by-month basis – yielded the opposite result. Pacific promptly identified these customers and processed refunds to those who had purchased the plan but failed to save money. Thereafter, the parties engaged in further discovery and preparation for evidentiary hearing.

Ultimately, the parties resolved the remaining issues pending between them and jointly filed a Settlement Proposal (Settlement), which focuses on remedies. The Settlement acknowledges the remedial action Pacific had already undertaken (i.e., refunds to 1,552 customers and a ban on the averaging of customers' variable usage data), but also obligates Pacific (1) to provide broader notice of its averaging error, and (2) to implement specified consumer safeguards, vis-a-vis a feedback mechanism, in connection with telephone marketing.

D.01-10-071 approved the Settlement and UCAN now seeks compensation for its contribution to D.01-10-071.

3. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code

§§ 1801-1812.¹ Section 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within prescribed time periods. The NOI must present information regarding the nature and extent of the customer's planned participation and an itemized estimate of the compensation the customer expects to request.² It may also request a finding of eligibility.

Other code sections address requests for compensation filed after a Commission decision is issued. Under § 1804(c), an intervenor requesting compensation must provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding." Section 1802(h) states that "substantial contribution" means that,

"in the judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees, reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation."

¹ All statutory citations are to the Public Utilities Code.

² To be eligible for compensation, an intervenor must be a "customer," as defined by § 1802(b). In D.98-04-059 (footnote 14), we affirmed our previously articulated interpretation that compensation be proffered only to customers whose participation arises directly from their interests as customers. (See D.88-12-034, D.92-04-051, and D.96-09-040.) In today's decision, "customer" and "intervenor" are used interchangeably.

Section 1804(e) requires the Commission to issue a decision that determines whether the customer has made a substantial contribution and what amount of compensation to award. The level of compensation must take into account the market rate paid to people with comparable training and experience who offer similar services, consistent with § 1806.

4. NOI to Claim Compensation

After review of the NOI filed by UCAN in this proceeding, Administrative Law Judge Vieth found UCAN eligible to file for intervenor compensation by ruling dated November 15, 1999. UCAN made a showing of significant financial hardship in its NOI.

5. Timeliness of Request

Section 1804(c) requires an eligible customer to file a request for an award within 60 days of issuance of a final order or decision by the Commission in the proceeding. D.01-10-071 was issued on October 25, 2001. UCAN's filing, on November 13, 2001, is therefore timely.

6. Substantial Contribution to Resolution of Issues

A party may make a substantial contribution to a decision in one of several ways. It may offer a factual or legal contention upon which the Commission relied in making a decision or it may advance a specific policy or procedural recommendation that the ALJ or Commission adopted.³ A substantial contribution includes evidence or argument that supports part of the decision

³ Section 1802(h).

even if the Commission does not adopt a party's position in total.⁴ Where a party has participated in settlement negotiations and endorses a settlement of some or all issues, the Commission uses its judgment and the discretion conferred by the Legislature to assess requests for intervenor compensation.⁵

D.01-10-071 approved the parties' Settlement without modification. While Rule 51.9 of the Commission's Rules of Practice and Procedure precludes disclosure of settlement discussions, UCAN's public positions on customer refunds, notice, and establishment of a mechanism for marketing feedback are reflected in the body of the Settlement and the attachments to it, which incorporate UCAN's proposals in whole or in part. Our independent assessment of the previously filed joint stipulation of facts, as well as the Settlement, confirms UCAN's representations that its participation successfully advanced ratepayer interests in this case. Moreover, UCAN, as the complainant, was highly instrumental in bringing this problem to our attention. We agree that UCAN made a substantial contribution to the decision.

⁴ The Commission has provided compensation even when the position advanced by the intervenor is rejected. D.89-03-063 (awarding San Luis Obispo Mothers For Peace and Rochelle Becker compensation in the Diablo Canyon Rate Case because their arguments, while ultimately unsuccessful, forced the utility to thoroughly document the safety issues involved).

⁵ See D.98-04-0590, *mimeo.* at 41.

7. Reasonableness of Requested Compensation

UCAN requests \$24,281.57⁶ as follows:

<u>Attorneys' Fees</u>		
Michael Shames	58.50 hrs. @ \$195	11,407.50
Charles Carbone	133.50 hrs. @ \$90	12,015.00
Subtotal		\$23,422.50
<u>Other Costs</u>		
Travel		216.00
Photocopying		44.35
Postage		77.55
Telephone/teleconference		24.17
Transcript costs		497.50
Subtotal		\$859.07
TOTAL		\$24,281.57

7.1 Overall Benefits of Participation

In D.98-04-059, the Commission adopted a requirement that a customer demonstrate that its participation was “productive,” as that term is used in § 1801.3, where the Legislature provided guidance on program administration. (See D.98-04-059, *mimeo.* at 31-33, and Finding of Fact 42.)

D.98-04-059 explained that participation must be productive in the sense that the costs of participation should bear a reasonable relationship to the benefits realized through such participation. D.98-04-059 directed customers to demonstrate productivity by assigning a reasonable dollar value to the benefits

⁶ UCAN erroneously totals its request at \$24,254.57. The cost table (Attachment B to UCAN’s request) shows the value of Shames hours at \$0.50 less than the mathematical result and reports transcript costs of \$470.50, rather than \$497.00, which is the figure in the supporting invoice UCAN provided to the ALJ by letter dated December 6, 2001.

of their participation to ratepayers. This exercise assists us in determining the reasonableness of the request and in avoiding unproductive participation.

Duplication of effort is not a concern in this case as UCAN and Pacific were the only parties. UCAN describes its productivity partly in qualitative terms and partly as a quantification. The quantification, \$12,435, represents the monetary refunds to customers. The qualitative benefit cannot be quantified readily. As UCAN asserts, UCAN detected an error in Pacific's marketing materials and brought that error to the attention of Pacific and the Commission; this provided the Commission with an appropriate vehicle to adopt a ban on the averaging of customers' variable usage data. This action has prospective value, in that it should help to prevent similar types of marketing errors in future. So, too, should implementation of the marketing feedback mechanism, which UCAN worked with Pacific to design.

All of these factors lead us to conclude that UCAN's participation was productive and yielded ratepayer benefits in excess of the costs UCAN incurred.

7.2 Hours Claimed

UCAN submits time logs to document the hours claimed by its attorneys. The logs include a daily breakdown of hours, briefly describe the work performed, and assign the work among major tasks/issues. UCAN also documents that (consistent with D.98-04-059) it has reduced by 50% all attorney time spent on travel or devoted to compensation activities. We conclude that UCAN has adequately and reasonably supported the total hours for which it claims compensation.

7.3 Hourly Rates

UCAN requests hourly rates for Shames of \$195 for work performed in 1999 and 2000. As UCAN notes, we authorized this rate for Shames in

D.00-01-045 for work performed in 1999. UCAN also requests compensation for Carbone for work performed during 1998-2000, at a rate we have authorized previously: \$90 per hour (D.00-07-048). We approve those rates in this case.

7.4 Other Costs

UCAN's expenses include nominal sums for photocopying, postage, and telephone/teleconferencing charges. UCAN also claims travel expenses for one round trip air flight between San Diego and San Francisco, including costs for taxi and airport parking. These costs are similar to those we have allowed in the past, and we find they are reasonable. UCAN also requests recovery for the \$497 fee for a court reporter's presence at UCAN's deposition of Pacific's employee, as well as the deposition transcript. Considering their expense, depositions should not be scheduled as a routine discovery medium, but when used appropriately, they can serve as an irreplaceable means of testing another party's contentions and its witnesses' veracity. Considering the parties' respective contentions in this case, and the terms of the Settlement, we find it reasonable that UCAN recover these costs.

8. Award to UCAN

We award UCAN \$24,281.57 for its substantial contribution to this case. Pacific shall pay UCAN this amount, and consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate) measured from the 75th day after UCAN's compensation request was filed.

As in all intervenor compensation decisions, we put UCAN on notice that the Commission staff may audit records related to this award. Thus, UCAN must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. The records should identify specific

issues for which UCAN requests compensation, the actual time spent by each employee, the applicable hourly rate and any other costs for which compensation may be claimed. Pursuant to Rule 77.7(f)(6), the otherwise applicable 30-day period for public review and comment is being waived.

Findings of Fact

1. UCAN has made a timely request for compensation for its contribution to D.01-10-071.

2. UCAN contributed substantially to D.01-10-071.

3. UCAN's participation was productive in that the costs it claims for its participation were reasonable considering the quantitative and qualitative benefits realized.

4. UCAN has requested hourly rates for attorneys Michael Shames (for 1999 through 2001) and Charles Carbone (for 1999 and 2000) that already have been approved by the Commission.

5. The miscellaneous costs incurred by UCAN are reasonable.

Conclusions of Law

1. UCAN has fulfilled the requirements of §§ 1801-1812, which govern awards of intervenor compensation.

2. UCAN should be awarded \$24,281.57 for its contribution to D.01-10-071.

3. Per Rule 77.7(f)(6) of the Commission's Rules of Practice and Procedure, the comment period for this compensation decision may be waived.

4. This order should be effective today so that UCAN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Consumers Action Network (UCAN) is awarded \$24,281.57 in compensation for its substantial contribution to Decision 01-10-071.
2. Pacific Bell (Pacific) shall pay UCAN the award granted by Ordering Paragraph 1. Payment shall be made within 30 days of the effective date of this order. Pacific shall also pay interest on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, with interest, beginning with the 75th day after November 9, the date UCAN's request was filed.
3. The comment period for today's decision is waived.
4. Case 99-06-053 is closed.

This order is effective today.

Dated January 9, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners